Supreme Court, U. S.
FILED
SEP 16 1997
CLERK

No. 97-261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY DILLON, *et al.*,

Petitioners,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT, GERALD HANAS, NIPPON SHARYO KAISHA, LTD., SUMITOMO CORPORATION, LOUIS T. KLAUDER & ASSOCIATES, WILLARD BLEWETT and DAVID RIORDAN,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioners, Terry Dillon and the Class he represents (hereinafter "the Class"), respectfully request that this Court grant the Class' Petition for Writ of Certiorari and thereafter review the judgment of the Indiana Court of Appeals entered on September 11, 1996.

REPLY IN SUPPORT OF CLASS' PETITION

NICTD, in contending that the Boiler Inspection Act preempts the Class' tort action, ignores this Court's departure from *Cippollone v. Liggett Group*, 505 U.S. 504, 112 S.Ct. 2608 (1992), which equates state tort actions with state legislation. With respect to preemption, NICTD speaks from both sides of its mouth. On the one hand, it concludes that the Class "presents no preemption issue worthy of this Court's review," but one page later refers to the Class' tort claims as "causes of action which are traditionally governed by state law." Both cannot simultaneously be true.

The Class' claims under 42 U.S.C. § 1983, while admittedly tortious in nature, are not defeated merely because the government concedes its negligence. The fact that an occurrence may be a state tort does not mean that it cannot also be a constitutional tort actionable by virtue of § 1983 since the two are not mutually exclusive. NICTD does not dispute that the harms alleged are harms of NICTD's own making, and not merely a failure to protect riders from *other* risks. While Blewett denies it, NICTD concedes that the Circuits are split on what exceptions should be applied to the general rule that governments owe no duty under the Due Process Clause to protect citizens from danger, yet dismisses that conflict as "academic." It defies logic how the inconsistent

interpretation of the statute which provides the vehicle for vindicating citizens' Constitutional rights can be considered merely "academic."

MEDTRONIC APPLIES AND SHOULD BE REINFORCED AND CLARIFIED

NICTD first attempts to classify *Medtronic v. Lohr*, 116 S.Ct. 2240 (1992) as inapposite since *Medtronic* did not construe the Boiler Inspection Act, but the Medical Device Amendments to the Food, Drug and Cosmetic Act. NICTD's argument proves too much, for if *Medtronic* does not apply to this case because the statute construed is different, then *Cippollone*, upon which NICTD so heavily relies, similarly does not apply since it did not construe the Boiler Inspection Act.

Second, NICTD attempts to stretch *Napier v. Atlantic Coastline R.R.*, 272 U.S. 605, 47 S.Ct. 207 (1926), from which both the Class and NICTD quote, beyond its stated limits. *Napier* clearly holds, and the Class does not contest, that states may not enact *legislation* regarding locomotive design, but *Napier* does not even address whether the Boiler Inspection Act preempts tort actions. Realizing this fact, NICTD relies instead on an isolated district court opinion, *Springston v. Consolidated Rail Corp.*, 863 F. Supp. 535 (N.D. Ohio 1994) and the Ninth Circuit's opinion in *Marshall v. Burlington Northern Inc.*, 720 F.2d 1149 (9th Cir. 1983). Reliance on *Springston* and *Marshall*, however, is erroneous given this Court's pronouncement in *CSX Transp., Inc. v. Easterwood*, 113 S.Ct. 1732 (1983), which casts doubt on the continued vitality of both.

In *Marshall*, the Ninth Circuit considered whether the Boiler Inspection Act preempted tort actions, a question NICTD characterizes as "well-settled" by *Napier*.[1] The Ninth Circuit concluded that if the federal authority conferred upon the Secretary of Transportation *could* conceivably address the same parts of the locomotive as the tort action did, then the tort action was preempted. 720 F.2d at 1152. *Marshall*'s conclusion, however, was not shared uniformly among the Circuits and this Court took up the issue in *Easterwood*. This Court concluded in *Easterwood* that the proper analysis is not whether federal regulation *could* involve the same subject matter as a state tort action, but a more narrow inquiry:

> pre-emption will lie *only if the federal regulations substantially subsume the subject matter of the relevant state law*.

113 S.Ct. at 1738 (emphasis added). Here, only general principles of duty, negligence, and product liability are involved. There is no evidence anywhere in the record to support the conclusion that the Boiler Inspection Act substantially subsumes the same areas of concern. Nor is there any evidence of a *specific* Boiler Inspection Act regulation pertaining to the crashworthiness of NICTD's trains. Therefore, there has been no preemption of the Class' claims.

NICTD's references to *Medtronic* reveal that NICTD is either ignorant of its holding, or realizes its significance and seeks to avoid its application at all costs. First, NICTD refers to *Medtronic* as having a "majority" opin-

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[1] *See* NICTD's Brief at 2.

ion.[2] *Medtronic* was a 4-1-4 plurality and the plurality openly refused to apply *Cippollone*.[3] Second, NICTD somehow argues that the *Medtronic* opinion relied upon *Cippollone*, when Justice Breyer's concurring opinion agreed with the pluarlity's conclusion, but questioned its refusal to rely on a *Cippollone*-like analysis. Justice Breyer could not reasonably have questioned the plurality's failure to apply *Cippollone* if, as NICTD contends, the plurality relied on it. *Medtronic* clearly controls this case and leads only to the conclusion that the Class' claims are not preempted by the Boiler Inspection Act.

CONFUSION EXISTS AMONG THE CIRCUITS AND THE RESPONDENTS REGARDING THE EXISTENCE AND APPLICATION OF EXCEPTIONS TO THE GENERAL "NO DUTY" RULE OF § 1983

NICTD, rather than contesting the conflict among the Circuits regarding whether to accept, and how broadly to apply, various exceptions to the general "no duty" rule discussed at length in the Class' Petition, simply acknowledges the conflict, but labels it "academic."[4] Blewett denies that there is any conflict at all. The confusion and disparity among the only two respondents is the most telling evidence that there is, indeed, confusion for this Court to rectify as requested in the Petition.

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[2] *See* NICTD's Brief at 6.

[3] *See* J. Breyer's concurring opinion in *Medtronic*, quoted in Petition at 8.

[4] In fact, NICTD only deepens the inconsistency by citing Third Circuit authority adopting the exception where it was not previously recognized by that court.

Section 1983 is the vehicle by which citizens' rights guaranteed by the Constitution are vindicated. Tolerating inconsistency in applying § 1983 is tantamount to permitting inconsistent interpretations of the Constitution itself. Such inconsistency cannot rationally be labeled "academic." Further, the basis for the "state-created danger" exception to § 1983's general "no duty" rule was the flicker of light in *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 109 S.Ct. 998 (1989), suggesting that the result would have been different had the governmental defendant actually created the plaintiff's danger.[5] Just this year in *United States v. Lanier*, 117 S.Ct. 1219, 1228 n. 7 (1997), this Court briefly reignited that light, stating, contrary to Blewett's argument, that custody was not necessary to state a claim under § 1983. The time has come for this Court to fully illuminate the issue and transform its two fleeting flashes of light into a beacon which dispels all darkness and confusion. NICTD trivializes this darkness, calling it "academic," and by so doing discounts this Court's statements in *DeShaney* and *Lanier* as well.

Other than in a footnote, NICTD does not even address the Class' discussion of the "state-restricted alternatives" exception, ostensibly conceding this point. It is not even clear that NICTD understands that the Class has asserted two separate exceptions, the "state-created danger" exception and the "state-restricted alternatives" exception, for in its discussion of the former, NICTD includes a footnote discussing the latter, apparently equating the two when they are separate and distinct.

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[5] *See* discussion of *DeShaney* in Petition at 13, 14.

In support of its argument that the Class' claims are merely "the type traditionally governed by state tort law principles" (yet somehow preempted by federal law), NICTD and Blewett ostensibly assume that a state common-law tort and a constitutional tort actionable through § 1983 are mutually exclusive. Doing so ignores case law which patently demonstrates there is no such bright line. In *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the Seventh Circuit stated that:

> the divergence between the nature of a [common law] tort and a Section 1983 constitutional tort is not always a dramatic one.

746 F.2d at 1280, n. 37.

This Court, in an opinion written by Justice Douglas, prescribed long ago that § 1983 must:

> be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Monroe v. Pape, 365 U.S. 167 (1961). Professor Nahmod, in analyzing *Monroe*, concluded that:

> This approach, based on inadequacy of state law, was apparently expanded later in the opinion: "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

Sheldon H. Nahmod, *Section 1983 and the Background of Tort Liability*, 50 IND. L.J. 5 (1974). Therefore, merely because the action alleged by the Class may also be a tort, it does not necessarily follow that the Class' claims are not a constitutional tort, NICTD and Blewett's arguments to the contrary notwithstanding.

NICTD and Blewett both cite *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061 (1992). Conspicuously absent from their analysis of *Collins* is any discussion of *Collins'* facts. In *Collins*, the plaintiff was asphyxiated by poison gas in the sewer line where the plaintiff was working. The City had no control over, nor did it create the poison gas. Here, not only did NICTD and the other defendants create the instrumentalities of death, they controlled them, aimed them directly at one another, and dispatched them at a target where the resulting casualties were certain to be the greatest. NICTD's and others' conduct in not merely *exposing* citizens to danger, but *creating* danger and then turning blind eyes to the grave hazards so created cannot reasonably be equated to the facts of *Collins*, in which the City merely permitted its employee to work in a sewer line containing poison gas which the City did not create, and the presence of which the City had no prior knowledge.

NICTD's and Blewett's attempts to equate this case to *Searles v. Southeastern Penn. Transp. Auth.*, 990 F.2d 789 (3d Cir. 1993) which involved the simple derailment of a train similarly fail. Here, the facts are far more egregious. In its Petition, the Class set out at length the factual allegations of its Complaint. Blewett does not challenge the factual allegations of the Class' Complaint at all. NICTD does not strenuously contest these allegations, mentioning them only in a footnote where it specifically addresses only two. Even omitting those two allegations from consideration for the sake of argument, NICTD has not challenged the fact that it knew well in advance of the crash that a single-track bridge, protected only by a malfunctioning signal light, when used for both eastbound and westbound trains posed an extreme

hazard to the safety of its passengers. In *Searles*, no such serious peril existed, nor did the government possess such actual knowledge of that imminent peril. NICTD further does not contest that it relied for safety on a signal light that regularly failed. Here, NICTD not only maintained a patently hazardous bridge, but compounded the risks by scheduling trains to simultaneously converge thereon. *Searles* merely involved a simple derailment and no such factual allegations. Equating *Searles* with this case is disingenuous.

There remains the question, however, of whether *Searles* is viable authority in the first instance. *Searles* was decided when the Third Circuit simply did not recognize the "state-created danger" exception, the inconsistent application of which NICTD considers merely "academic." NICTD now argues that the Third Circuit does indeed recognize the exception and has always recognized it, but was merely waiting for a case to fit the framework of the exception and relies on *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) in support of that proposition. Again, NICTD and Blewett have been disingenuous with this Court. It is impossible for the Third Circuit to have always recognized the exception and simultaneously "adopt" it, the Third Circuit's express decision in *Kneipp*.[6] If the Third Circuit has indeed now

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[6] "We adopt the 'state-created danger' theory as a viable mechanism for establishing a constitutional violation under 42 U.S.C. § 1983." 95 F.3d at 1201. The facts of *Kneipp* also support the Class' position. An intoxicated detainee was sent on her way by the police despite her obvious inability to ambulate. When she subsequently fell down an embankment and her exposure to the elements resulted in hypothermia, anoxia,

(continued...)

recognized the exception after rejecting it for so long, that fact only heightens the confusion and makes more poignant the need for this Court to resolve it.

While NICTD's response is fashioned as in opposition to the Class' Petition, NICTD has wholly failed to argue, much less demonstrate, why the issues the Class presented therein do not warrant this Court's attention. Instead, NICTD has merely responded that the Indiana Court of Appeals was correct on the merits. Indeed, NICTD has not challenged the confusion among the circuits with respect to what, if any, exceptions apply to the general "no-duty" rule of § 1983. Similarly, NICTD has not challenged the Class' discussion of the "state-restricted alternatives" exception to the general rule or denied the majority of the grave factual allegations of the Class' Complaint, questioning only two.

CONCLUSION

The Class concluded in its Petition that this Court should halt the current state of affairs in which confusion prevails and a government's constitutional duties are dependent upon geography. The disagreement between the Respondents as to whether such confusion exists demonstrates that even among those skilled in navigating the law, this Court needs to erect a lighthouse for their benefit. The Class respectfully requests

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[6] (...continued)
and permanent loss of most of her bodily functions, the Third Circuit held that § 1983 provided a remedy. NICTD and Blewett did so much more than merely send the Class on its way.

that this Court grant a writ of certiorari to the Indiana Court of Appeals to review its judgment of September 11, 1996.

Respectfully submitted,

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